

United States Courts
Southern District of Texas
FILED

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David J. Bradley, Clerk of Court

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7 **UNITED STATES DISTRICT COURT**
8 **SOUTHERN DISTRICT OF TEXAS**
9

10 UNITED STATES OF AMERICA,

11 Plaintiff

12 vs.

13 DARREN DAVID CHAKER,

14 Defendant.

Case No.: 4:12CR00168-001

**APPLICATION TO FILE MOTION TO
SEAL RECORDS AND
DECLARATION IN SUPPORT OF
MOTION TO SEAL RECORDS
UNDER SEAL**

15 The Supreme Court has developed a two-pronged test for determining whether a
16 First Amendment right of access extends to a particular kind of proceeding or document:
17 (1) whether the type of proceeding or document in question has traditionally been open to
18 the public; and (2) whether public access to the document or proceeding would play a
19 "significant positive role in the functioning of the particular process in question." *Press-*
20 *Enterprise II v. Superior Court*, 478 U.S. at 8; see also *Globe Newspaper Co. v. Superior*
21 *Court*, 457 U.S. 596, 605-06 (1982).

22 The motion and declaration ("motion") refer and attach records that have clear
23 expectation of privacy. Although the records are a public record at this point, the records
24 sought to be sealed are not such that is "traditionally been open" to the public.
25 Specifically,

A. Medical Records:

Reference to Defendant's medical records are referenced in argument at page 3
and entirety of declaration with its exhibits consists of **nothing but medical records**. The

1 right to privacy in a person's medical records is protected under 45 CFR 160 and 164
 2 subparts (A) and [*3] (E). In *San Ramon Regional Med. Ctr., Inc. v. Principal Life Ins.*
 3 *Co.*, the court went so far as to sua sponte seal medical records because it found that the
 4 need to protect the patient's "confidential medical information outweigh[ed] any necessity
 5 for disclosure[.]" No. C 10-02258 SBA, 2011 U.S. Dist. LEXIS 4100, 2011 WL 89931,
 at *1 n.1 (N.D. Cal. Jan. 10, 2011).

6 Similarly, the Health Insurance Portability and Accountability Act of 1996
 7 ("HIPAA"), Pub.L. No. 104-191, 110 Stat.1936 (1996) (codified primarily in Titles 18,
 8 26 and 42 of the United States Code) generally provides for confidentiality of medical
 9 records. 42 U.S.C. §§ 1320d-1 to d-7. *See Acara v. Banks*, 470 F.3d 569, 571 (5th Cir.
 10 2006). (*Woods v. Smith* (S.D.Tex. Feb. 20, 2013, No. H-11-2485) 2013 U.S.Dist.LEXIS
 23647, at *20.)

11 As such, defendant request this motion is granted due to extensive discussion and
 12 attachment of medical records in support of his underlying motion to seal.

13 **B. Sealed Records – Non-Public Records.**

14 The entire motion to seal past page 3 refers to sealed records and matters related to
 15 Defendant providing records to the USAO in San Diego. Once a record is sealed, a right
 16 to privacy attaches. *Gonzalez v. Spencer*, 336 F.3d 832 (9th Cir.), cert. denied 157
 17 L.Ed.2d 253, 124 S.Ct. 334 (2003) (attorney and law firm liable for accessing sealed case
 file without court authorization).

18 Exhibit A is a sealed court order from a Nevada court. The court order sealing the
 19 file is attached as Exhibit B. Exhibit I, is a redacted version of a sealed order to change
 20 Defendant's name. The order to seal the file and prevent the new name from being
 21 published was weighed by the court to justify sealing based on a danger to Defendant's
 22 safety.

23 Exhibit J, is currently a public record, but originates from the attorney-client file
 24 of Las Vegas attorney Robert Johnson.

25 Exhibit P is a certificate from the California Safe at Home Program. These
 certificate or names of participants are not public records. The California Address

1 Confidentiality Program, Safe at Home, is governed by Government Code sections 6205
2 through 6216. Government Code section 6205 et seq. enables state and local agencies to
3 respond to requests for public records without disclosing the changed name or location of
4 a victim.

5 Exhibit Q is pages "4 of 6" and "5 of 6" of a report from the North Las Vegas
6 Police Department. Exhibit R of the motion before the court demonstrates the report was
7 ordered sealed. Somehow, the two pages were obtained by Leesa Fazal, formerly of the
8 Nevada Attorney General's Office. Likewise Exhibit R through X are sealed court orders,
9 or records confirming compliance with the Nevada court order to seal records. Likewise,
10 page 11-16 of the motion to seal before the court makes exclusive argument and
11 references to these sealed records. When a Nevada court orders a record sealed then
12 "[a]ll proceedings recounted in the record are deemed never to have occurred." NRS
13 179.285. *Mkhitaryan v. U.S. Bancorp*, 2013 U.S. Dist. LEXIS 111903, *33-34 (D. Nev.
14 Aug. 8, 2013) (emphasis added). *State, Dept. of Motor Vehicles and Public Safety v.*
15 *Frangul*, 110 Nev. 46, 867 P.2d 397. It allows a Defendant to deny "all proceedings
16 recounted in the record are deemed never to have occurred, and the person to whom [the
17 order] pertains may properly answer accordingly to any inquiry concerning the
18 arrest...and the events and proceedings relating to the arrest" NRS § 179.285.

19 Exhibits Z and AA are non-public letters related furnishing a confidential report to
20 a civil attorney absent a subpoena or lawful order to do so.

21 Given the contents of the motion to seal, its exhibits, and the declaration along
22 with its exhibits, it is clear the consolidated motion before the court has or makes
23 reference to nothing but sealed records or medical records. This honorable court should
24 seal the motion and the declaration since it is permitted to keep otherwise-public
25 litigation materials out of the public domain upon a showing of "good cause."

To determine good cause, the court must balance the harm to the party seeking
protection with the public's right to know about the litigation. *Id* at 787. "[I]f a case
involves private litigants, and concerns matters of little legitimate public interest, that
should be a factor weighing in favor of granting or maintaining an order of

1 confidentiality." Id Among the good cause that satisfies the movant's burden is a
 2 demonstration of "particularly serious embarrassment." Id at 788 (quoting *Cipdlone v*
 3 *Liggitt Group, Ire*; 785 F.2d 1108, 1122 (3d Or. 1986), cert. denied, 484 U.S. 976, 108
 4 S. Ct. 487, 98 L. Ed. 2d 485 (1987)); see also *Pearson u Miller*, 211 F.3d 57, 73 (3d Gr.
 5 2000) ("The injury shown, however, need be no more than 'embarrassment'; thus, a party
 6 need not establish a monetizable injury.").

7 **C. Return of Documents:** In the event this honorable court is not inclined to
 8 grant this request to seal the motion, declaration and its exhibits, Defendant requests the
 9 court return such to him. See *United States v. Baez-Alcaino*, 718 F. Supp. 1503, 1507
 10 (M.D. Fla. 1989) ("When a document is requested to be filed in camera it is presented to
 11 the appropriate judge to make a decision whether the document should be filed under
 12 seal, filed in the public documents, or returned to the submitting party, who may then
 13 [decide how to proceed with the matter]."). (*United States v. Damaryan* (E.D.Cal. July
 14 27, 2017, No. 2:13-cr-00274-GEB) 2017 U.S.Dist.LEXIS 118115, at *6.).

13 CONCLUSION

14 It is respectfully submitted this court grant this motion in full and order the Clerk
 15 of the Court to seal Defendant's Motion to Seal Records and the accompanying
 16 Declaration in Support of Motion to Seal Records.

17 Dated: September 6, 2018

Respectfully submitted,



18 Darren Chaker

19 Defendant

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PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and case or adversary proceeding. My business address is: 1140 Wall Street La Jolla, CA 92037

A true and correct copy of the foregoing document entitled (*specify*): **Motion to Seal Records; Declaration in Support of Motion to Seal Records**

will be served or was served (a) on the judge in chambers in the form and manner required by LBR 5005-2(d); and (b) in the manner stated below:

1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF): Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (*date*) _____, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

☐ Service information continued on attached page

2. SERVED BY UNITED STATES MAIL:

On (*date*) 9/7/19, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

**U.S. District Court
515 Rusk Avenue
Houston, TX 770012**

☐ Service information continued on attached page

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (*state method for each person or entity served*): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (*date*) 9/9/19 Emailed AUSA Andrew Gould, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

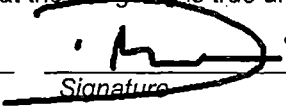
I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

9/7/19

Date

Darren Chaker

Printed Name


Signature